

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

SUSAN A. BEYERS,

Plaintiff,

v.

MICHAEL J. ASTRUE,  
Commissioner of Social Security,

Defendant.

No. CV-10-160-JPH

ORDER GRANTING DEFENDANT'S  
MOTION FOR SUMMARY  
JUDGMENT AND DENYING  
PLAINTIFF'S MOTION FOR  
SUMMARY JUDGMENT

BEFORE THE COURT are cross-Motions for Summary Judgment. (ECF No. 21, 23.) Attorney Maureen J. Rosette represents plaintiff; Special Assistant United States Attorney Leisa A. Wolf represents defendant. The parties have consented to proceed before a magistrate judge. (ECF No. 8.) After reviewing the administrative record and briefs filed by the parties, the court **DENIES** plaintiff's Motion for Summary Judgment and **GRANTS** defendant's Motion for Summary Judgment.

**JURISDICTION**

Plaintiff Susan A. Beyers (plaintiff) protectively filed for supplemental security income (SSI) and disability insurance benefits (DIB) on August 17, 2005. (Tr. 59, 70, 956.) Plaintiff alleged an onset date of June 30, 2004. (Tr. 59.) Benefits were denied initially and on reconsideration. (Tr. 27, 31, 954.) Plaintiff requested a hearing before an administrative law judge (ALJ), which was held before ALJ Hayward Reed on October 17, 2007. (Tr. 1138-99.) Plaintiff was represented by counsel and testified at the hearing. (Tr. 1161-1178, 1179-1187, 1189-91, 1193.) Medical expert Allen Bostwick, Ph.D., and vocational expert Debra LaPoint also testified. (Tr. 1139-1160, 1179, 1188, 1191-98.) The ALJ denied

benefits (Tr. 12-23) and the Appeals Council denied review. (Tr. 3.) The matter is now before this court pursuant to 42 U.S.C. § 405(g).

### STATEMENT OF FACTS

The facts of the case are set forth in the administrative hearing transcripts, the ALJ decisions, and the briefs of plaintiff and the Commissioner, and will therefore only be summarized here.

Plaintiff was 48 years old at the time of the hearing. (Tr. 1161.) Plaintiff has a GED and took a couple of college courses. She served in the Air Force from 1978-1982 and had the job of driving and expediting supplies to the flight line. (Tr. 1161.) She also has work experience as a waitress, bartender, bar manager, sales associate, dispatcher and cook. (Tr. 1162.) Her last job involved nighttime maintenance at a casino. (Tr. 1162.) She testified that she stopped working because she was ill too much. (Tr. 1162.) She has Hepatitis C, chronic bronchitis, cardiopulmonary disease (COPD), sinusitis and migraines. (Tr. 1162, 1167.) If she does anything strenuous, it is hard for her to catch her breath and she has to stop frequently. (Tr. 1163.) She testified she experiences headaches daily, sleeplessness, some dementia, balance problems, pain in both knees, sciatica, neck and shoulder pain, fatigue, and poor appetite. (Tr. 1164.) She has mental issues related to dementia, bipolar and PTSD. (Tr. 1168.) Plaintiff testified she has no short-term memory and panic and anxiety attacks. (Tr. 1168-69.) Her medications cause a number of adverse side effects. (Tr. 1173.) She testified she used to use illegal drugs and her last drug use was in May 2007. (Tr. 1169.)

### STANDARD OF REVIEW

Congress has provided a limited scope of judicial review of a Commissioner's decision. 42 U.S.C. § 405(g). A Court must uphold the Commissioner's decision, made through an ALJ, when the determination is not based on legal error and is supported by substantial evidence. *See Jones v. Heckler*, 760 F. 2d 993, 995 (9<sup>th</sup> Cir. 1985); *Tackett v. Apfel*, 180 F. 3d 1094, 1097 (9<sup>th</sup> Cir. 1999). "The [Commissioner's] determination that a plaintiff is not disabled will be upheld if the findings of fact are supported by substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572 (9<sup>th</sup> Cir. 1983) (citing 42 U.S.C. § 405(g)). Substantial evidence is more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d 1112, 1119 n. 10 (9<sup>th</sup> Cir. 1975), but less than a preponderance. *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9<sup>th</sup> Cir. 1989); *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d 573, 576 (9<sup>th</sup>

1 Cir. 1988). Substantial evidence “means such evidence as a reasonable mind might accept as adequate  
 2 to support a conclusion.” *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (citations omitted). “[S]uch  
 3 inferences and conclusions as the [Commissioner] may reasonably draw from the evidence” will also be  
 4 upheld. *Mark v. Celebrezze*, 348 F.2d 289, 293 (9<sup>th</sup> Cir. 1965). On review, the Court considers the record  
 5 as a whole, not just the evidence supporting the decision of the Commissioner. *Weetman v. Sullivan*, 877  
 6 F.2d 20, 22 (9<sup>th</sup> Cir. 1989) (quoting *Kornock v. Harris*, 648 F.2d 525, 526 (9<sup>th</sup> Cir. 1980)).

7 It is the role of the trier of fact, not this Court, to resolve conflicts in evidence. *Richardson*, 402  
 8 U.S. at 400. If evidence supports more than one rational interpretation, the Court may not substitute its  
 9 judgment for that of the Commissioner. *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579  
 10 (9<sup>th</sup> Cir. 1984). Nevertheless, a decision supported by substantial evidence will still be set aside if the  
 11 proper legal standards were not applied in weighing the evidence and making the decision. *Browner v.*  
 12 *Sec’y of Health and Human Services*, 839 F.2d 432, 433 (9<sup>th</sup> Cir. 1988). Thus, if there is substantial  
 13 evidence to support the administrative findings, or if there is conflicting evidence that will support a  
 14 finding of either disability or nondisability, the finding of the Commissioner is conclusive. *Sprague v.*  
 15 *Bowen*, 812 F.2d 1226, 1229-30 (9<sup>th</sup> Cir. 1987).

### 16 SEQUENTIAL PROCESS

17 The Social Security Act (the “Act”) defines “disability” as the “inability to engage in any  
 18 substantial gainful activity by reason of any medically determinable physical or mental impairment which  
 19 can be expected to result in death or which has lasted or can be expected to last for a continuous period  
 20 of not less than twelve months.” 42 U.S.C. §§ 423 (d)(1)(A), 1382c (a)(3)(A). The Act also provides  
 21 that a plaintiff shall be determined to be under a disability only if his impairments are of such severity  
 22 that plaintiff is not only unable to do his previous work but cannot, considering plaintiff’s age, education  
 23 and work experiences, engage in any other substantial gainful work which exists in the national economy.  
 24 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B). Thus, the definition of disability consists of both medical  
 25 and vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9<sup>th</sup> Cir. 2001).

26 The Commissioner has established a five-step sequential evaluation process for determining  
 27 whether a claimant is disabled. 20 C.F.R. §§ 404.1520, 416.920. Step one determines if he or she is  
 28 engaged in substantial gainful activities. If the claimant is engaged in substantial gainful activities,

benefits are denied. 20 C.F.R. §§ 404.1520(a)(4)(I), 416.920(a)(4)(I).

If the claimant is not engaged in substantial gainful activities, the decision maker proceeds to step two and determines whether the claimant has a medically severe impairment or combination of impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii). If the claimant does not have a severe impairment or combination of impairments, the disability claim is denied.

If the impairment is severe, the evaluation proceeds to the third step, which compares the claimant's impairment with a number of listed impairments acknowledged by the Commissioner to be so severe as to preclude substantial gainful activity. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii); 20 C.F.R. § 404 Subpt. P App. 1. If the impairment meets or equals one of the listed impairments, the claimant is conclusively presumed to be disabled.

If the impairment is not one conclusively presumed to be disabling, the evaluation proceeds to the fourth step, which determines whether the impairment prevents the claimant from performing work he or she has performed in the past. If plaintiff is able to perform his or her previous work, the claimant is not disabled. 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv). At this step, the claimant's residual functional capacity ("RFC") assessment is considered.

If the claimant cannot perform this work, the fifth and final step in the process determines whether the claimant is able to perform other work in the national economy in view of his or her residual functional capacity and age, education and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v); *Bowen v. Yuckert*, 482 U.S. 137 (1987).

The initial burden of proof rests upon the claimant to establish a *prima facie* case of entitlement to disability benefits. *Rhinehart v. Finch*, 438 F.2d 920, 921 (9<sup>th</sup> Cir. 1971); *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9<sup>th</sup> Cir. 1999). The initial burden is met once the claimant establishes that a physical or mental impairment prevents him from engaging in his or her previous occupation. The burden then shifts, at step five, to the Commissioner to show that (1) the claimant can perform other substantial gainful activity and (2) a "significant number of jobs exist in the national economy" which the claimant can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9<sup>th</sup> Cir. 1984).

A finding of "disabled" does not automatically qualify a claimant for disability benefits. *Bustamante v. Massanari*, 262 F.3d 949, 954 (9<sup>th</sup> Cir. 2001.) When there is medical evidence of drug or

1 alcohol addiction, the ALJ must determine whether the drug or alcohol addiction is a material factor  
2 contributing to the disability. 20 C.F.R. §§ 404.1535(a), 416.935(a). It is the claimant's burden to prove  
3 substance addiction is not a contributing factor material to her disability. *Parra v. Astrue*, 481 F.3d 742,  
4 748 (9<sup>th</sup> Cir. 2007).

5 If drug or alcohol addiction is a material factor contributing to the disability, the ALJ must  
6 evaluate which of the current physical and mental limitations would remain if the claimant stopped using  
7 drugs or alcohol, then determine whether any or all of the remaining limitations would be disabling. 20  
8 C.F.R. §§ 404.1535(b)(2), 416.935(b)(2).

### 9 ALJ'S FINDINGS

10 At step one of the sequential evaluation process, the ALJ found plaintiff has not engaged in  
11 substantial gainful activity since June 30, 2004, the alleged onset date. (Tr. 14.) At step two, he found  
12 Plaintiff has the following severe impairments: hepatitis C, personality disorder, and substance use  
13 disorder. (Tr. 14.) At step three, the ALJ found that plaintiff does not have an impairment or  
14 combination of impairments that meets or medically equals one of the listed impairments in 20 C.F.R.  
15 Part 404, Subpt. P, App. 1. (Tr. 15.) The ALJ then determined:

16 [I]ncluding the substance use disorder, the claimant has the residual  
17 functional capacity to perform light work, which involves occasional  
18 lifting less than 20 pounds, frequent lifting or carrying of 10 pounds,  
19 sitting for 6 hours and standing/walking for 6 hours in an 8 hour workday  
20 and having good use of the arms and hands for repetitive grasping, holding  
21 and turning objects (i.e., gross manipulation). The claimant would also be  
22 mildly to moderately limited in her ability to get along with coworkers or  
23 peers without distracting them or exhibiting behavioral extremes,  
24 moderately limited in her ability to interact appropriately with the general  
25 public and set realistic goals or make plans independently of others,  
26 moderate to markedly impaired in her ability to complete a normal  
27 workday or workweek without interruptions from psychologically based  
28 symptoms and to perform at a consistent pace without an unreasonable  
number and length of rest periods, and markedly limited in her ability to  
carry out detailed instructions and maintain attention and concentration for  
extended periods.

(Tr. 16.) At step four, the ALJ found plaintiff is unable to perform past relevant work. (Tr. 17.) Based  
on plaintiff's age, education, work experience, residual functional capacity and the testimony of a  
vocational expert, and including the substance use disorder, the ALJ determined there are no jobs that  
exist in significant numbers in the national economy that the claimant can perform. (Tr. 17.)

Because there is evidence of substance abuse, the ALJ continued the analysis. The ALJ

1 determined that if plaintiff stopped the substance use, she would continue to have the severe impairments  
2 of hepatitis C and personality disorder. (Tr. 18.) Next, the ALJ determined that if plaintiff stopped the  
3 substance use, plaintiff would not have an impairment or combination of impairments that meets or  
4 medically equals any of the impairments listed in 20 C.F.R. Part 404, Subpt. P, App. 1. (Tr. 18.) The  
5 ALJ then determined:

6           If the claimant stopped the substance use, the claimant would have the  
7 residual functional capacity to perform light work which involves  
8 occasional lifting less than 20 pounds, frequent lifting or carrying of 10  
9 pounds, sitting for 6 hours and standing/walking for 6 hours in an 8 hour  
10 workday and having good use of the arms and hands for repetitive  
11 grasping, holding and turning objects (i.e., gross manipulation). The  
12 claimant would also be mildly to moderately limited in her ability to  
maintain attention and concentration for extended periods, and get along  
with coworkers or peers without distracting them or exhibiting behavioral  
extremes, mildly limited in her ability to accept instructions and respond  
appropriately to criticism from supervisors, and moderately limited in her  
ability to set realistic goals or make plans independently of others.

13 (Tr. 19.) The ALJ found that if plaintiff stopped the substance use, she would be able to perform past  
14 relevant work. (Tr. 22.) Because plaintiff would not be disabled if she stopped the substance use, the  
15 ALJ found that plaintiff's substance use disorder is a contributing factor material to the determination  
16 of disability. (Tr. 22.) As a result, the ALJ concluded plaintiff has not been disabled within the meaning  
17 of the Social Security Act at any time from the alleged onset date through the date of the decision. (Tr.  
18 22.)

### 19 ISSUES

20           The question is whether the ALJ's decision is supported by substantial evidence and free of legal  
21 error. Specifically, plaintiff asserts the ALJ: (1) improperly relied on the opinion of the medical expert;  
22 and (2) failed to properly reject the opinions of treating and examining physicians. (ECF No. 22 at 11-  
23 17.) Defendant asserts the ALJ properly evaluated the medical opinions of record. (ECF No. 24 at 6-14.)

### 24 DISCUSSION

25           Plaintiff argues the ALJ improperly rejected the opinion of plaintiff's treating physician, Dr.  
26 Edwards, in favor of the opinion of the medical expert, Dr. Bostwick. (ECF No. 22 at 15-16). In  
27 disability proceedings, a treating physician's opinion carries more weight than an examining physician's  
28 opinion, and an examining physician's opinion is given more weight than that of a non-examining

1 physician. *Benecke v. Barnhart*, 379 F.3d 587, 592 (9<sup>th</sup> Cir. 2004); *Lester v. Chater*, 81 F.3d 821, 830  
2 (9<sup>th</sup> Cir. 1995). If the treating or examining physician's opinions are not contradicted, they can be  
3 rejected only with clear and convincing reasons. *Lester*, 81 F.3d at 830. If contradicted, the opinion can  
4 only be rejected for "specific" and "legitimate" reasons that are supported by substantial evidence in the  
5 record. *Andrews v. Shalala*, 53 F.3d 1035, 1043 (9<sup>th</sup> Cir. 1995). Historically, the courts have recognized  
6 conflicting medical evidence, the absence of regular medical treatment during the alleged period of  
7 disability, and the lack of medical support for doctors' reports based substantially on a claimant's  
8 subjective complaints of pain as specific, legitimate reasons for disregarding a treating or examining  
9 physician's opinion. *Flaten v. Secretary of Health and Human Servs.*, 44 F.3d 1453, 1463-64 (9<sup>th</sup> Cir.  
10 1995); *Fair*, 885 F.2d at 604.

11 If a treating or examining physician's opinions are not contradicted, they can be rejected only  
12 with clear and convincing reasons. *Lester v. Chater*, 81 F.3d 821, 830 (9<sup>th</sup> Cir. 1996). However, if  
13 contradicted, the ALJ may reject the opinion if he states specific, legitimate reasons that are supported  
14 by substantial evidence. *See Flaten v. Secretary of Health and Human Serv.*, 44 F.3d 1453, 1463 (9<sup>th</sup> Cir.  
15 1995) (citing *Magallanes v. Bowen*, 881 F.2d 747, 753 (9<sup>th</sup> Cir. 1989); *Fair v. Bowen*, 885 F.2d 597, 605  
16 (9<sup>th</sup> Cir. 1989).

17 Dr. Edwards completed a DSHS Psychological/Psychiatric Evaluation form dated June 1, 2005.  
18 (455-58.) He diagnosed bipolar mood disorder NOS, polysubstance abuse, and anxiety disorder NOS.  
19 (Tr. 456.) He assessed one severe and four marked cognitive limitations and one moderate and four  
20 marked social limitations. (Tr. 457.) Dr. Edwards noted the presence of alcohol and drug abuse and  
21 indicated none of the diagnosed conditions are caused by past or present drug or alcohol abuse. (Tr. 456.)  
22 He also noted that alcohol or drug treatment would be likely to decrease the severity of the condition and  
23 that plaintiff had been abstinent for 60 days. (Tr. 456.) Dr. Edwards indicated that alcohol or drug abuse  
24 exacerbates the diagnosed conditions by causing "increased frequency and worse severity of mood  
25 lability." (Tr. 457.) The ALJ gave Dr. Edwards' opinion little weight in assessing plaintiff's limitations  
26 without drug or alcohol abuse. (Tr. 21.)

27 Plaintiff argues the ALJ improperly rejected Dr. Edwards' opinion. (ECF No. 22 at 15-16.) The  
28 ALJ gave two reasons for rejecting the assessment of Dr. Edwards. (Tr. 21.) First, the ALJ pointed out



1 that plaintiff was either using or withdrawing from substance abuse at the time of the assessment. (Tr.  
2 21.) In December 2004, a psychological exam by Shari Lyszkiewicz, MS, indicates plaintiff had  
3 completed inpatient drug and alcohol treatment but was drinking again.<sup>1</sup> (Tr. 463.) Ms. Lyszkiewicz  
4 noted symptoms associated with withdrawal. (Tr. 465.) An office visit note from Dr. Mendez reflects  
5 plaintiff reported drinking two to three times per week, one or two drinks at a time. (Tr. 439.) In  
6 February 2005, plaintiff told Dr. Edwards her last meth use was in September 2004, but she reported  
7 drinking one to two beers every two weeks. (Tr. 434-35.) She told Dr. Edwards on April 28, 2005 that  
8 her illicit drug use included “hydro 10s” from a “street pharmacy.” (Tr. 419.) Plaintiff admitted she  
9 started using again in August 2005 (Tr. 492) and also said she “slipped” from clean and sober in  
10 September 2005. (Tr. 304.) Plaintiff relies on her report to Dr. Edwards stating that she had been  
11 abstinent for 60 days. (ECF No. 22 at 15.) The ALJ found plaintiff is not credible and that finding is  
12 not challenged by plaintiff.<sup>2</sup> Based on the evidence, the ALJ reasonably determined that plaintiff  
13 continued to be influenced by the effects of drug and alcohol use in the months leading up to the June 1  
14 assessment by Dr. Edwards. Even if the evidence could be considered ambiguous during this period, it  
15 is the role of the ALJ to resolve conflicts and ambiguity in the evidence. *See Morgan v. Commissioner*,  
16 169 F.3d 595, 599-600 (9<sup>th</sup> Cir. 1999); *see also Sprague v. Bowen*, 812 F.2d 1226, 1229-30 (9<sup>th</sup> Cir.  
17 1987). Thus, the ALJ cited a specific, legitimate reason supported by substantial evidence for rejecting

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19 <sup>1</sup>Ms. Lyszkiewicz completed a DSHS Psychological/Psychiatric Evaluation form and a  
20 psychological assessment report on December 6, 2004. (Tr. 459-65.) The narrative report was co-signed  
21 by Dr. Rosekrans, who adopted the findings and conclusions of the report as his own. (Tr. 465.)

22 <sup>2</sup>If the ALJ finds a claimant's testimony as to the severity of her pain and impairments is  
23 unreliable, the ALJ must make a credibility determination with findings sufficiently specific to permit  
24 the court to conclude that the ALJ did not arbitrarily discredit claimant's testimony. *Morgan v. Apfel*, 169  
25 F.3d 595, 601-02 (9<sup>th</sup> Cir. 1999). In the absence of affirmative evidence of malingering, the ALJ's reasons  
26 must be “clear and convincing.” *Lingenfelter v. Astrue*, 504 F.3d 1028, 1038-39 (9<sup>th</sup> Cir. 2007); *Vertigan*  
27 *v. Halter*, 260 F.3d 1044, 1050 (9<sup>th</sup> Cir. 2001); *Morgan*, 169 F.3d at 599. The ALJ cited numerous clear  
28 and convincing reasons supported by substantial evidence supporting the credibility finding, which is not  
challenged by plaintiff. (Tr. 20-21.)



1 Dr. Edwards' report.

2 Second, the ALJ concluded that Dr. Edwards' findings are inconsistent with other evidence which  
3 shows that without drug use, plaintiff had no marked mental limitations. (Tr. 21.) The consistency of  
4 a medical opinion with the record as a whole is a relevant factor in evaluating a medical opinion.  
5 *Lingenfelter v. Astrue*, 504 F.3d 1028, 1042 (9<sup>th</sup> Cir. 2007); *Orn v. Astrue*, 495 F.3d 625, 631 (9<sup>th</sup> Cir.  
6 2007). In July 2004, Dr. Elder noted plaintiff exhibited severe character pathology with very limited  
7 insight and that her current behavior is consistent with drug abuse. (Tr. 16, 177.) Dr. Winter indicated  
8 that plaintiff's somatic focus and complaints of depression, irritability and poor sleep were likely related  
9 to recent drug use and withdrawal. (Tr. 16, 178.) Dr. Brown, a treating psychiatrist, opined in November  
10 2004 that plaintiff is capable of light work. (Tr. 21, 466-69.) Ms. Lyszkiewicz indicated plaintiff's mood  
11 swings were related to withdrawal from drug use in December 2004. (Tr. 16, 465.) In November 2005,  
12 Dr. Baldwin, a state reviewing psychologist, concluded that plaintiff should be able to do simple and  
13 some complex tasks and that she may have some trouble focusing and concentrating, but could certainly  
14 be productive. (Tr. 21, 216.) She opined that plaintiff would do better with superficial public contact,  
15 may take somewhat longer to adapt to changes in the workplace and would need some structure, but  
16 appears adaptable. (Tr. 216.) Dr. Baldwin noted plaintiff would clearly do better with sustained  
17 abstinence. (Tr. 216.) In February 2006, Dr. Brown noted that plaintiff was experiencing an  
18 amphetamine induced psychotic disorder, but she may also have a borderline personality disorder. (Tr.  
19 16-17, 723.) The ALJ cited the opinion of Dr. Bostwick, the medical expert, who reviewed the medical  
20 evidence and concluded there is no evidence establishing marked or severe limitations if plaintiff stopped  
21 substance abuse. (Tr. 1149.) Dr. Bostwick also cited additional evidence documenting substance use  
22 throughout the record. (Tr. 1143-44.) Plaintiff cites to no evidence supporting Dr. Edwards' findings  
23 that plaintiff has marked and severe limitations without the effects of drug abuse and the court finds none  
24 in the record. The ALJ, on the other hand, cited varied evidence constituting substantial evidence in  
25 support of the conclusion that Dr. Edwards' opinion is not consistent with the longitudinal record. Thus,  
26 this is a specific, legitimate reason for rejecting the assessment and the ALJ did not err.

27 Plaintiff also argues the ALJ improperly relied on the opinion of Dr. Bostwick. Dr. Bostwick  
28 testified that plaintiff had a substance induced mood disorder related to her ongoing drug abuse, but

1 opined that her more significant problem in terms of limitations is personality disorder. (Tr. 1143.) He  
2 opined that if the substance abuse was removed, there really is no mood disorder, but plaintiff would  
3 continue to have a personality disorder. (Tr. 1147.) Dr. Bostwick testified that the evidence indicates  
4 plaintiff was using drugs or alcohol throughout the record. (Tr. 1143-44, 1146.) He opined that with  
5 substance abuse, plaintiff has mild, moderate and marked limitations. (Tr. 1153-56.) Dr. Bostwick also  
6 testified that he is not aware of any evidence in the record showing plaintiff has a moderate to marked  
7 impairment when not actively using drugs or alcohol. (Tr. 1149.) He determined that without substance  
8 use, plaintiff would be mildly to moderately limited in her ability to maintain attention and concentration  
9 for extended periods and get along with coworkers or peers without distracting them or exhibiting  
10 behavioral extremes, mildly limited in her ability to accept instructions and respond appropriately to  
11 criticism from supervisors, and moderately limited in her ability to set realistic goals or make plans  
12 independently of others. (Tr. 1153-56.) The ALJ adopted Dr. Bostwick's opinion, noting it is supported  
13 by the medical evidence of record. (Tr. 16, 19, 21.)

14       The opinion of a non-examining physician cannot by itself constitute substantial evidence that  
15 justifies the rejection of the opinion of either an examining physician or a treating physician. *Lester*, 81  
16 F.3d at 831, citing *Pitzer v. Sullivan*, 908 F.2d 502, 506 n.4 (9<sup>th</sup> Cir. 1990). However, the opinion of a  
17 non-examining physician may be accepted as substantial evidence if it is supported by other evidence in  
18 the record and is consistent with it. *Andrews*, 53 F.3d at 1043; *Lester*, 81 F.3d at 830-31. Cases have  
19 upheld the rejection of an examining or treating physician based on part on the testimony of a non-  
20 examining medical advisor; but those opinions have also included reasons to reject the opinions of  
21 examining and treating physicians that were independent of the non-examining doctor's opinion. *Lester*,  
22 81 F.3d at 831, citing *Magallanes v. Bowen*, 881 F.2d 747, 751-55 (9<sup>th</sup> Cir. 1989) (reliance on laboratory  
23 test results, contrary reports from examining physicians and testimony from claimant that conflicted with  
24 treating physician's opinion); *Roberts v. Shalala*, 66 F.3d 179 (9<sup>th</sup> Cir. 1995) (rejection of examining  
25 psychologist's functional assessment which conflicted with his own written report and test results). Thus,  
26 case law requires not only an opinion from the consulting physician but also substantial evidence (more  
27 than a mere scintilla but less than a preponderance), independent of that opinion which supports the  
28 rejection of contrary conclusions by examining or treating physicians. *Andrews*, 53 F.3d at 1039.

1 As detailed, *supra*, the ALJ cited substantial evidence independent of Dr. Bostwick's opinion in  
2 rejecting Dr. Edwards' assessment. Specifically, the ALJ cited evidence from Dr. Brown, Dr. Elder, Dr.  
3 Winter, Dr. Rosekrans and Ms. Lyszkiewicz, and Dr. Baldwin in support of his conclusions. Even if  
4 certain portions of the record support plaintiff's arguments, the court must uphold the ALJ's decision  
5 where the evidence is susceptible to more than one rational interpretation. *Magallanes v. Bowen*, 881  
6 F.2d 747, 750 (9<sup>th</sup> Cir. 1989). As a result, the ALJ did not err by relying on Dr. Bostwick's opinion.

7 Plaintiff also argues the ALJ failed to properly reject the opinions of Dr. Rosekrans and Ms.  
8 Lyszkiewicz. (ECF No. 16-17.) Ms. Lyszkiewicz completed a DSHS Psychological/Psychiatric  
9 Evaluation form dated December 6, 2004. (Tr. 459-62.) She diagnosed personality disorder NOS with  
10 borderline and dependent features, adjustment disorder with mixed anxiety and depressed mood, alcohol  
11 dependence sustained partial remission, methamphetamine dependence early partial remission, and  
12 cocaine dependence, sustained full remission. (Tr. 460.) She assessed a marked limitation in the ability  
13 to exercise judgment and make decision, in the ability to relate appropriately to coworkers and  
14 supervisors, and in the ability to respond appropriately to and tolerate the pressures and expectations of  
15 a normal work setting. (Tr. 461.) In a narrative report also dated December 6, 2004, Dr. Rosekrans and  
16 Ms. Lyszkiewicz noted that a diagnosis of bipolar disorder is not valid in light of plaintiff's  
17 methamphetamine addiction. (Tr. 465.) It was noted that plaintiff's symptoms of depression and anxiety  
18 which had begun the previous month was attributed to withdrawal from drug use. (Tr. 465.)  
19 Furthermore, it was observed that plaintiff had only been clean for a few months and was at high risk of  
20 relapse since she was not attending any kind of outpatient program. (Tr. 465.)

21 The ALJ noted Ms. Lyszkiewicz' opinion in establishing plaintiff's severe impairments and  
22 developing the residual functional capacity including substance abuse. (Tr. 14, 16.) In establishing  
23 plaintiff's residual functional capacity without substance abuse, however, the ALJ distinguished MS.  
24 Lyszkiewicz' opinion as prepared at a time when the claimant was experiencing greater mental limitations  
25 due to substance abuse. (Tr. 21.) This is supported by plaintiff's statement to Ms. Lyszkiewicz that she  
26 had relapsed in September 2004 and admissions to Ms. Lyszkiewicz and Dr. Mendez the next day that  
27 she was still drinking alcohol. (Tr. 438, 463.) Plaintiff points out that Ms. Lyszkiewicz checked boxes  
28 indicating plaintiff's marked cognitive limitation is not most likely the result of alcohol or drug abuse and

1 that the cognitive limitation is not likely to dissipate with 60 days of sobriety. (Tr. 461.) However, in  
2 the narrative report, Dr. Rosekrans and Ms. Lyszkiewicz concluded that plaintiff's symptoms were due  
3 to withdrawal. (Tr. 463.) Individual medical opinions are preferred over check-box reports. *See Crane*  
4 *v. Shalala*, 76 F.3d 251, 253 (9<sup>th</sup> Cir. 1996); *Murray v. Heckler*, 722 F.2d 499, 501 (9<sup>th</sup> Cir. 1983).  
5 Indeed, Ms. Lyszkiewicz noted her explanation was contained in the narrative report. (Tr. 461.) The  
6 check-boxes may be construed as creating some ambiguity regarding Ms. Lyszkiewicz's opinion, but the  
7 ALJ is the arbiter of ambiguities, not the court, and reasonably resolved the apparent conflict by accepting  
8 the contents of the narrative report. (Tr. 21.) As a result, the ALJ did not err in considering the opinions  
9 of Ms. Lyszkiewicz and Dr. Rosekrans.

10 Lastly, plaintiff complains that the ALJ twice stated he gave significant weight to the opinions  
11 of plaintiff's treating and examining providers, when he in fact rejected the opinion of Dr. Edwards.  
12 (ECF No.22 at 15.) This argument is without merit. The context of the ALJ's statement indicates the  
13 ALJ intended to give weight to the treating and examining providers except as specifically noted. (Tr.  
14 21.) Even if the ALJ erred by stating he gave weight to the opinions of treating and examining providers,  
15 the error is harmless. It is evident that the ALJ intended to reject Dr. Edwards' opinion and he properly  
16 did so by discussing specific, legitimate reasons supported by substantial evidence in the record. As long  
17 as there is substantial evidence supporting the ALJ's decision and the error does not affect the ultimate  
18 nondisability determination, the error is harmless. *See Carmickle v. Comm'r, Soc. Sec. Admin.*, 533 F.3d  
19 1155, 1162 (9<sup>th</sup> Cir. 2008); *Stout v. Comm'r, Soc. Sec. Admin.*, 454 F.3d 1050, 1055 (9<sup>th</sup> Cir. 2006);  
20 *Batson v. Comm'r Soc. Sec. Admin.*, 359 F.3d 1190, 1195-97 (9<sup>th</sup> Cir. 2004).

**CONCLUSION**

Having reviewed the record and the ALJ's findings, this court concludes the ALJ's decision is supported by substantial evidence and is not based on error.

Accordingly,

**IT IS ORDERED:**

1. Defendant's Motion for Summary Judgment (**ECF No. 23**) is **GRANTED**.
2. Plaintiff's Motion for Summary Judgment (**ECF No. 21**) is **DENIED**.

The District Court Executive is directed to file this Order and provide a copy to counsel for plaintiff and defendant. Judgment shall be entered for defendant and the file shall be **CLOSED**.

DATED September 29, 2011

S/ JAMES P. HUTTON  
UNITED STATES MAGISTRATE JUDGE